No. 18-6547

IN THE

Supreme Court of the United States

CHRISTOPHER BROOKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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MARCH 7TH, 2019

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REPLY BRIEF FOR PETITIONER

In its brief in opposition, the government expressly concedes (at 6, 9) that the circuits are divided on the question presented—*i.e.*, whether a criminal offense that may be committed with a reckless *mens rea* satisfies the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i). *See* Pet. 5–7 (summarizing circuit split). And the government has acknowledged that this question "arises with some frequency." *Haight v. United States*, BIO 15 (U.S. No. 18-370) (cert. denied Jan. 7, 2019); *see* BIO 9–10 (incorporating *Haight* BIO). The government nonetheless opposes review, but its reasons do not withstand scrutiny.

1. Despite acknowledging the circuit conflict on this recurring question, the government asserts (at 9–10) that review is not warranted. Yet it does not dispute that the question presented is not only recurring but important, affecting whether countless criminal defendants will be subject to the ACCA's fifteen-year mandatory minimum penalty. *See* Pet. 8. Nor does the government suggest that the conflict will resolve itself given the First Circuit's firm position. *See* Pet. 8–9.

Instead, the government characterizes (at 9) the circuit split as "shallow." But that characterization is inaccurate. Indeed, the government has itself observed that five circuits have held that reckless conduct satisfies the elements clause post-*Voisine v. United States*, 136 S. Ct. 2272 (2016). *Haight*, BIO 12. That 5–1 split is hardly shallow. And, in any event, this Court routinely grants certiorari in

federal criminal cases to resolve 3–1, 2–1, and even 1–1 splits over questions of statutory interpretation.[1] So that cannot be a basis for denying review here.

Other than mischaracterizing the depth of the circuit split, the government (at 9–10) merely refers back to its opposition in *Haight* (though cites the wrong page numbers of its brief). But aside from unremarkably observing that another circuit is currently considering the question, the government's only reason for opposing review in *Haight* was that Justice Kavanaugh authored the panel opinion, risking resolution by an eight-member Court. *Haight*, BIO 14–15. No such risk is present here. *See* Pet. 10 n.1. In short, the question presented has deeply divided the circuits and will determine whether a wide variety of reckless crimes will subject countless defendants to the ACCA's fifteen-year mandatory-minimum penalty.

2. Because the question presented does warrant review, the government argues (at 7–9) that this case does not present or implicate it. That is manifestly incorrect. The government does not dispute that, under Florida law, aggravated assault may be committed recklessly. *See* Pet. 9–10 (citing numerous Florida cases expressly saying so); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (stating that federal courts are bound by state courts' interpretation of the elements of state offenses). And the government does not dispute that the Eleventh Circuit's denial of relief here turned on its ruling Petitioner's prior Florida aggravated

[1] *See, e.g.*, *Dahda v. United States*, 138 S. Ct. 1491, 1496 (2018) (2–1); *Koons v. United States*, 138 S. Ct. 1783 (2018) (3–1); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2–1); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1–1); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2–1); *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016) (1–1); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1–1).

offense satisfied the elements clause. *See* Pet. 9; Pet. App. 2a–3a. Because Florida aggravated assault may be committed recklessly, and because the Eleventh Circuit determined that Petitioner's Florida aggravated-assault conviction satisfied the elements clause, this case presents the question dividing the circuits. Indeed, had Petitioner had been sentenced in the First Circuit, he would have obtained relief.

a. Unable to dispute that Florida aggravated assault may be committed with a reckless *mens rea*, the government asks (at 9) this Court to "defer" to the Eleventh Circuit's construction of Florida law. But there is no such construction to defer *to*. Contrary to the government's suggestion, the Eleventh Circuit has never determined that Florida aggravated assault requires more than reckless conduct. In fact, as explained below, the Eleventh Circuit has refused to consider Florida case law at all. In any event, this Court does not defer to a federal court's state-law interpretation that is "clearly wrong," "clearly erroneous," or "unreasonable," *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (citations omitted), for it correctly recognizes that the courts of appeal do not "have some natural advantage in this domain," *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996).

b. Because Florida case law makes clear that aggravated assault may be committed recklessly, the government emphasizes that the Eleventh Circuit did not analyze the recklessness question below. But that is not Petitioner's fault. He repeatedly pressed that specific argument in both the district court and the court of appeals throughout this litigation. *See* Pet. 3–5. That alone is sufficient to present the question for review here and now. *See United States v. Williams*, 504 U.S. 36,

41 (1992) (discussing this Court's "traditional rule" that "operates (as it is phrased) in the disjunctive" so as to "preclude[ ] a grant of certiorari only when the question presented was not pressed or passed upon below") (quotation marks omitted).

Moreover, the Eleventh Circuit has effectively passed on that question too because, absent intervention by this Court, it will *never* consider Petitioner's recklessness argument in the context of Florida aggravated assault. In *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013), the court held that Florida aggravated assault satisfied the elements clause, but it overlooked that this offense could be committed recklessly. Following *Turner,* criminal defendants began highlighting that analytical omission, but the Eleventh Circuit refused to consider their recklessness argument. The court has since made clear that, "even if *Turner* [wa]s flawed" for that reason, the court remains "bound" by *Turner* under its "prior panel precedent rule." *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017). Despite an earlier call to reconsider *Turner* en banc, *see id.* at 1257–60 (Jill Pryor, J., concurring in result), the Eleventh Circuit continues to apply *Turner*, and there is "no indication" that the en banc court will reconsider it "anytime soon." *Ovalles v. United States*, 905 F.3d 1231, 1269 (11th Cir. 2018) (en banc) (Martin, J., dissenting) (internal citation omitted).

This case aptly illustrates that troubling dynamic. The Eleventh Circuit refused to even grant Petitioner a certificate of appealability ("COA") to address his argument that Florida aggravated assault does not satisfy the elements clause due to its reckless *mens rea.* From the perspective of criminal defendants like

Petitioner, the Eleventh Circuit's refusal to consider that argument is no different than a ruling expressly rejecting it. Federal prosecutors in the Eleventh Circuit will continue seeking—and federal courts will continue upholding—ACCA sentences based on Florida aggravated assault. That particular offense, moreover, is one of the most common violent felonies supporting ACCA enhancements in the Eleventh Circuit. *See* Appendix A (citing over two dozen Eleventh Circuit cases applying *Turner* and its progeny to Florida aggravated assault). And Florida is the national epicenter of ACCA litigation: from 2013 to 2017, the Eleventh Circuit accounted for the most ACCA sentences of any circuit in the country (approximately 25% each year); and its three Florida districts accounted for at least 75% of ACCA cases in that circuit. *See* U.S. Sent. Comm'n, Interactive Sourcebook.[2]

Denying review here would thus create perverse decision-making incentives. It would encourage courts of appeals to insulate their rulings from review by this Court by refusing to address properly-presented arguments under the guise of the prior panel precedent rule—even where those arguments have been embraced by another circuit and will affect whether countless criminal defendants will be subject to a fifteen-year mandatory-minimum sentence. If anything then, the Eleventh Circuit's intransigent refusal to address the recklessness question presented here militates in favor of review, not against it. And because five other circuits on the same side of the circuit split *have* fully analyzed that recklessness question, *see* Pet.

[2] https://isb.ussc.gov/ (go to: All Tables and Figures; Table 22).

7, all of the arguments have been fully aired. Thus, the Eleventh Circuit's refusal to weigh in will not detract from this Court's review on the merits.

3. Lastly, in a throwaway sentence, the government asserts (at 10) that this case would a poor vehicle because the Eleventh Circuit denied Petitioner a COA. But the government does not explain why a COA denial impedes this Court's review. And for good reason: it doesn't. As this Court has recently explained: "With respect to this Court's review, [28 U.S.C.] § 2253 [the statute requiring a COA] does not limit the scope of our consideration of the underlying merits." *Buck v. Davis*, 137 S. Ct. 759, 774–75 (2017). Accordingly, the Court has decided merits issues on a COA denial. *See, e.g., Buck*, 137 S. Ct. at 774–80; *Welch v. United States*, 136 S. Ct. 1257, 1263–64, 1268 (2016); *Slack v. McDaniel*, 529 U.S. 473, 485–89 (2000).

Doing so here would not be at all problematic. In denying Petitioner relief, the Eleventh Circuit did not issue some summary order devoid of reasoning. Rather, it issued a written opinion expressly rejecting Petitioner's argument on the merits. Pet. App. 2a–3a (ruling that "binding precedent forecloses his argument[ ] that his conviction[ ] for aggravated assault" does "not constitute [a] violent felon[y] under the elements clause"). The Eleventh Circuit would have issued the same *Turner*-based ruling even if a COA had issued. In the end, the government urges this Court to deny review on an important, recurring question dividing the circuits—thereby condemning Petitioner to serve a potentially-illegal sentence—just because the Eleventh Circuit refused to entertain a viable argument that he repeatedly pressed. That position is untenable. This Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Eleventh Circuit Opinions Applying *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013) (holding that Florida aggravated assault satisfies the elements clause) and its Progeny

United States v. Kendricks, __ F. App'x __, 2018 WL 6584243, at *4–5 (11th Cir. Dec. 13, 2018)

United States v. Santoriello, __ F. App'x __, 2018 WL 6177153, at *1 (11th Cir. Nov. 26, 2018)

United States v. Morrobel, __ F. App'x __, 2018 WL 5793438, at *3–4 (11th Cir. Nov. 5, 2018)

United States v. Hunter, 749 F. App'x 811, 813 (11th Cir. Sept. 12, 2018)

Bivins v. United States, 747 F. App's 765, 770–71 (11th Cir. Aug. 28, 2018)

Hylor v. United States, 896 F.3d 1219, 1223–24 (11th Cir. 2018)

United States v. Chappelle, 735 F. App'x 644, 648 (11th Cir. May 25, 2018)

United States v. Bulter, 714 F. App'x 980, 981 (11th Cir. Mar. 6, 2018)

United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018)

Flowers v. United States, 724 F. App'x 820, 823–24 (11th Cir. Feb. 16, 2018)

United States v. Casamayor, 721 F. App'x 890, 896–97 (11th Cir. Jan. 5, 2018)

United States v. Trevino, 720 F. App'x 565, 571 (11th Cir. Jan. 4, 2018)

United States v. McCarthen, 707 F. App'x 951, 952 (11th Cir. Dec. 20, 2017)

United States v. Boatwright, 713 F. App'x 871, 877 (11th Cir. Nov. 1, 2017)

United States v. Tarver, 712 F. App'x 88, 886 (11th Cir. Oct. 18, 2017)

United States v. Kelly, 697 F. App'x 669, 670 (11th Cir. Sept. 25, 2017)

United States v. Ackerman, 709 F. App'x 925, 929 (11th Cir. Sept. 14, 2017)

United States v. Jackson, 696 F. App'x 981, 982 (11th Cir. Aug. 24, 2017)

United States v. Calhoun, 696 F. App'x 482, 483 (11th Cir. Aug. 21, 2017)

United States v. Maida, 703 F. App'x 773, 774 (11th Cir. July 18, 2017)

United States v. Williams, 700 F. App'x 895, 897–98 (11th Cir. June 23, 2017)

United States v. Hughes, 688 F. App'x 889, 899–90 (11th Cir. June 8, 2017)

United States v. Towns, 668 F. App'x 886, 886 (11th Cir. Sept. 20, 2016)

United States v. Golden, 854 F.3d 1256, 1257 (11th Cir. 2017)

In re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016)

In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016)

United States v. Thomas, 656 F. App'x 951, 955 (11th Cir. July 13, 2016)